

International Law's Relative Authority

A review of Nicole Roughan, *Authorities. Conflicts, Cooperation, and Transnational Legal Theory* (Oxford University Press, 2013) 288 pp, Hbk £60, ISBN 978-0199671410.

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THE PROJECT

The philosophy of international law is blooming. While more and more international lawyers, especially in the newer generation, are starting to address philosophical questions about the nature of international law and its legitimacy, moral and political philosophers have long discussed international law and institutions.¹ What has been slow in coming, however, is for legal philosophers, and especially those in the Anglo-American analytical tradition, to venture beyond the safe ground of traditional state-related jurisprudence and apply their mind to international law and its philosophical specificities.² While things are starting to change,³ there is a dearth

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¹ See eg Allen Buchanan, 'International Law, Philosophy of' in Edward Craig (ed), *Routledge Encyclopedia of Philosophy* (Routledge, 2006), www.rep.routledge.com/article/T070SECT4; Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford University Press, 2004); Fernando Tesón, *A Philosophy of International Law* (Westview, 1998). For a discussion of the contribution of moral philosophies of international law to the legal philosophy of international law, see Samantha Besson, 'Moral Philosophy and International Law' in Florian Hoffmann and Anne Orford (eds), *Oxford Handbook of International Legal Theory* (Oxford University Press, forthcoming).

² See also Jeremy Waldron, 'International Law: "A Relatively Small and Unimportant Part" of Jurisprudence?', NYU School of Law Public Law Research Paper no 13-56 (October 2013) 222–3, <http://ssrn.com/abstract=2326758> or <http://dx.doi.org/10.2139/ssrn.2326758>: 'What we miss is what might have been done.'

³ See eg William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009); Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010); Detlef von Daniels, *The Concept of Law from a Transnational Perspective* (Ashgate, 2010); Michael Giudice and Keith Culver, *Legality's Borders: An Essay in General Jurisprudence* (Oxford University Press, 2010); Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press, 2012); Liam Murphy, *What Makes Law* (Cambridge University Press, 2014) ch 8: 'What Makes Law Law? Law Beyond the State'.

of in-depth jurisprudential reflection about international law. This is particularly the case with the legitimacy or legitimate authority of international law.⁴ In this context, Nicole Roughan's dissertation-turned-monograph is a long-awaited first book-length contribution to the debate. And no doubt, given its qualities, will it remain a reference for many years to come.

The book's starting point is the interaction between national, international and transnational law and the involved overlapping and sometimes conflicting claims to authority. The question the author asks is 'whether, and if so how, plurality of authority and relationships between authorities affect or even effect the existence and legitimacy of authority' (5). According to Roughan, 'the key theoretical puzzle generated by circumstances of plurality' 'is not plurality of law in itself, but confusion over law's authority' (3). In reaction to this puzzle, the book aims at bringing together two discussions that have too often taken place separately: scholarly debates pertaining to the plurality of law that are not sufficiently familiar with theories of authority, and theoretical discussions of authority that have not paid enough attention to the circumstances of plurality (60). The book actually endeavours to contribute to both fields of enquiry at the same time: 'although theories of authority help us understand and evaluate relationships between authorities, the practice of plural authority also has implications for understanding what authority is and when it is justified' (3).

The book's argument is that existing, state-based conceptions of authority cannot be sustained wherever there are multiple authorities sharing or competing for domains, generating difficulties of ranking or identifying authorities. Instead, Roughan suggests that we should understand authority in pluralist circumstances as 'relative authority' and devise a new theory of its legitimacy to go with it. The new theory proposed in the book includes in particular revising the idea that law claims to have exclusive legitimate authority. The theory is two-pronged. First of all, with respect to the grounds of authority, the 'plurality of authority, and the relationships that exist between holders of authority, must be built into any justification of authority' (5–6). Secondly, with respect to the conditions of legitimate authority, authority is best conceived of as 'a relative power', whether it is 'shared' in the 'same domain' or 'mutually dependent' in 'interactive domains', and the relationships between these 'relative authorities' should amount to 'a relativity condition upon their legitimacy' (6).

Roughan's book is well structured and a pleasure to read. It covers a lot of ground and literature, but its line of argument remains clear throughout. It succeeds in engaging with arguments on all sides of the debate (7) and, in return, its claims should be equally easy to relate to for legal scholars working on issues of legal pluralism and by legal philosophers interested in the authority of law beyond the state.

⁴ There have been exceptions, however; see eg Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15(5) *European Journal of International Law* 907; Samantha Besson, 'The Authority of International Law: Lifting the State Veil' (2009) 31(3) *Sydney Law Review* 343; Allen Buchanan, 'The Legitimacy of International Law' in Besson and Tasioulas (n 3) 79; John Tasioulas, 'The Legitimacy of International Law' in Besson and Tasioulas (n 3) 97.

THE ARGUMENT

The book is comprised of 13 chapters divided into four parts. The first chapter functions as an introduction to the book. It presents the aim and structure of the book, outlines its argument and makes a few preliminary clarifications.

The first part of the book consists of three chapters pertaining to the two key concepts in the book: authority and plurality. There, Roughan defines legitimate authority (chapter 2), explains what she means by the plurality of authorities and their cooperative or conflicting relationships (chapter 3), and assesses the state of the discussion in legal theory (chapter 4). The upshot of this first part of the book is that existing accounts of legal authority 'do not adequately address the puzzles raised by plurality of authority' and, in particular, cannot explain whether 'plurality of legitimate authority is conceptually possible, and/or how different types of coordinated, cooperative or conflicting relationships can be explained' (9).

The second part of the book is comprised of two chapters that take up different puzzles raised by plural authority for existing theories of legitimate authority. It focuses mostly on Joseph Raz's theory of authority, 'which presents both the most promise and the biggest challenge for explaining plurality of authority' (9), but also on Jeremy Waldron's variation of Razian authority. In chapter 5, Roughan argues that 'neither theorist adequately addresses the impact of plurality upon the practice of public authority, especially when such plurality occurs among disjunctive authorities' (9). Chapter 6 identifies two problems for Raz's normal justification thesis in case of conflicting authorities and obligations: 'problems of ranking and identification' (9). The effect of this second part is that Razian authority 'is not complete or conclusive for explaining plurality of authority' (10).

The third part of the book consists of three chapters that constitute the core of the book's argument and articulate its pluralist conception of authority: 'relative authority'. Chapter 7 argues for a conjunctive justification of authority, ie a combination of procedural and substantive justifications. This is both a general argument and one that aims at addressing 'the puzzles raised by plurality' (10). To enable the proposed conception of authority to respond to the intractability of the identification and ranking of conflicting authorities, chapter 8 proposes to add a 'relativity condition' for the justification of authority that entails that 'where there is relative authority (either in a single or in interacting domains), the authorities concerned must engage in appropriate relationships with one another if they are to enjoy legitimate authority' (10). In chapter 9, Roughan argues that the law's claim to authority should be 'reconceived as a claim to relative authority' and that this implies not only openness to other systems of law, but also responsiveness to them (10). The conclusion of part three is that the account of relative authority defended may serve as a building block for 'pluralist jurisprudence', 'by offering a theory of law's authority that replaces supremacy and exclusivity with relativity and relationships' (10).

The fourth and final part of the book comprises four chapters that focus on the implications of the proposed conception of relative authority in three legal contexts that demonstrate pluralist features: international and transnational law (chapter

10); European Union (EU) law (chapter 11); and infranational law (chapter 12). It closes with a case-study on the Crown-Maori relationships in New Zealand, a testimony to the origins of the author and an illustration of the analysis of relative authority within the state presented in chapter 12 (chapter 13). A common feature to all four chapters is that they apply the proposed theory of relative authority to different legal contexts and show how it sheds light on some of the existing controversies in each area. They are 'intended to be food for further thought' rather than 'complete analyses' (11) and should not be understood as developments in the argument presented in the third part of the book. Nor are they meant to provide prescriptive solutions to conflicts of authority or suggestions for institutional reform (6).

TWO CRITIQUES

Roughan's book may be read as a contribution to the legal philosophy of authority in circumstances of legal plurality in general (chapters 7–9), but also in specific pluralistic contexts such as the European Union, transnational law or infranational law (chapters 10–13) (6–7). The focus of this review will be on its contribution to the legal philosophy of authority of international law and the latter's relationship to domestic law (chapter 10).

There are two critiques I would like to make and that correspond to the two steps in the book's argument: the first one pertains to Roughan's understanding of the circumstances of legal plurality and the second to the conception of relative authority she proposes.

First of all, *the pluralist circumstances of law*. There are three points to make here.

To start with, the book embraces a broad notion of the pluralist features of law that pertains to objects as variable as legal norms, regimes, orders and systems, on the one hand, and encompasses relationships as variable as the concurrence, interaction and potential conflict between those various legal entities, on the other (1, 7, 44–48). While the fact that it is inclusive of as many legal relationships as possible—and hence can be applied, in the fourth part of the book, equally to international law, transnational law, EU law and infranational law—is actually a quality and strength of the argument, it also amounts to a weakness at the same time. Indeed, the argument mostly remains at a very high level of generality, and is sometimes difficult to follow as a result. More regrettably, the indeterminacy about the object of plurality enables the author to make the strong claim that relations between legal 'systems' themselves may be put on a par with other normative relations of authority within a legal system (155); that since authority is 'relative', legal systems should be as well; and that, as a result, the question of the existence of distinct legal systems is the wrong question to ask (149–50).

Take international law, for instance. Here, the questions not only of the existence of a legal system and of its relationship to the domestic legal systems, but also of the various 'regimes' within that 'system' and of their autonomy, remain hugely controversial. Ignoring those questions and the theories thereof at the stage

of qualification of the legal practice threaten its normative assessment from the perspective of the theory of authority later in the book. Assuming too readily a 'one-size-fits-all' pluralist description of the practice of international law that straddles all norms, sources and regimes, all subject matters and all types of normative relationships within international law and with domestic law can only be misleading. It is actually particularly telling that most international lawyers who are familiar with arguments of legal pluralism and actually endorse them in other contexts do not apply it to qualify the practice of international law. Of course, Roughan is right: those issues are inherently related to issues of authority and legitimacy (150).⁵ However, reducing them to the latter is just as problematic as ignoring the latter in the first place.

The second issue I have with the book's qualification of the practice of law is that it discusses interchangeably the plurality of law and that of institutions applying and making that law. This assimilation then translates into the interchangeable reference to 'authorities' and institutions having 'authority' (28), on the one hand, and to the authority of law itself (1), on the other. Of course, the book's account of authority is institutional and factors in institutional and procedural justifications of authority (27–29, 126–8). The problem is rather that it assumes too readily that institutions and law always go hand in hand and does not explain, when they do, how institutional and legal authority actually relate.

To come back to international law, one of its features is precisely that many of its legal norms are not applied by international institutions. As a matter of fact, they are mostly applied by domestic ones.⁶ One may even argue that some international legal norms are made through domestic law-making processes or, at least, together with domestic ones in a transnational fashion (eg customary international law norms or international human rights courts' interpretations).⁷ In other cases, on the contrary, international legal norms are applied and sometimes even made by too many international institutions at the same time (eg multiple international courts). This characteristic disjunction between law and institutions is arguably key to understanding the authority of international law, therefore, but goes amiss in the proposed account.

A third and final difficulty resides in the nature and hence in the order of questions. The author claims that the pluralist 'practice' of law raises a puzzle for existing 'theories' of legal authority. The way she understands the pluralist features of the practice, however, already implies a given understanding of (normative)

5 See also Samantha Besson, 'Theorizing the Sources of International Law' in Besson and Tasioulas (n 3) 163 on the relationship between the validity and the legitimacy of international law.

6 In this respect, Roughan (175–8) misunderstands the argument made in Besson (n 4) 373–4. My point was precisely to show that states do not (only) act as subjects of the authority of international law, but most of the time as officials ('authorities' in Roughan's terms) and hence both as subjects of authority and sources of authority (see 80). Note that depending on whether it is the law or the institution that exercises authority in this context, the authority will be either international or domestic or both.

7 See eg Samantha Besson, 'Human Rights and Constitutional Law: Patterns of Mutual Validation and Legitimation' in Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press, forthcoming 2015).

authority, ie the very exclusive understanding she suggests we should reject in the second half of her argument. Not only does this approach pre-empt some of the possible objections to the argument by making the latter the answer to a (constructed) puzzle in the practice,⁸ but, conversely, it also prevents the reader from approaching conflicts of authority (43–44) (what Roughan actually also describes interchangeably as the ‘plurality of law’ (1)) not so much as a challenge but as a justified feature of the practice of law (together with other features of the practice that need to be accounted for, such as the principles of primacy or subsidiarity). The root difficulty, I think, is that legal plurality cannot be treated in this ontological fashion;⁹ it reflects a normative reading of law and hence an understanding of the law’s normativity and, accordingly, of its authority—both claimed and justified. In fact, Roughan seems to accept this claim—albeit only through the distinction between legal pluralism and legal plurality (2 fn 3, 44, 69) and hence through the relationship between legal pluralism itself and relative authority (146).¹⁰ Curiously, however, she does not see its implications for the first descriptive, ontological or even ‘phenomenological’ step in her argument (3, 7, 44, 155).

Second, *the conception of relative authority*. The book argues that existing conceptions of the authority of law, and especially Razian authority, are not—or at least are not sufficiently—relative. The question, of course, depends on what is meant by relativity. Despite the author’s efforts at distinguishing various meanings thereof (137–8), I am not sure her use of the term is rigorous enough.¹¹ Or that it is actually the right term for what she has in mind. What she wants to say, I think, is that law is inherently relational, and that its authority *qua* authority within a normative relationship cannot but be relational as a result. This is particularly important if one focuses not so much on the different sources of authority but on its (shared) subjects and regards them as pivotal to the justifications and hence also to the allocation of authority, as I did elsewhere and as Roughan does as well (26–27). This comes out even more clearly if one’s account of legal authority is also political and democratic in nature.¹² There is nothing here, however, that cannot be explained within a Razian account of authority. To that extent, the conjunctive justifications of the authority model proposed by Roughan are not so different from those proposed in revised Razian accounts of the justifications of authority and especially from public and democratic ones.¹³

⁸ See eg the discussion on 47–48 and then on 48–59 and the circularity it embraces between the description of the plurality of law *qua* plurality of authorities and the later argument about relative authority and its justifications and conditions (eg 137–42).

⁹ See eg Samantha Besson, ‘The Truth about Legal Pluralism’, Review of Nico Krisch’s *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2012) 8(2) *European Constitutional Law Review* 354.

¹⁰ As a matter of fact, even those distinctions are not always consistent: see eg the discussions on 155, 163.

¹¹ Sometimes, the term ‘relative’ is used as the opposite of ‘autonomous’ (or ‘binary’ (15)), but at other times as the opposite of ‘independent’ (or ‘singular’ (8, 42, 138)) or ‘exclusive’ (or ‘monist’ (8, 15, 149)).

¹² The question of ‘popular sovereignty’, though, is curiously—and regrettably—excluded from the scope of the book’s argument on ‘public authority’ (14).

¹³ See eg Jeremy Waldron, ‘Authority for Officials’ in Lukas Meyer *et al* (eds), *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford University Press, 2003) 45; Besson (n 4).

Furthermore, because it is likely that there will be more than one normative relationship at a time to any given subject, authority is necessarily also about pre-empting or excluding other reasons and hence other normative relations from applying. As a matter of fact, the claim to supremacy in authority is only understandable if authority is deemed inherently relational in this way. It is the point of legal authority to help set priorities between applicable reasons and, by extension, between normative relations that give rise to those reasons, whether they are moral or legal and arise from this or that legal source, regime or order. And the principles guiding those priorities in authority in case of conflict or interaction derive from those underpinning the (inherently relational) justifications of authority in the first place. Again, there is nothing here that cannot be explained within a Razian account of authority. Coordination (including of authorities), one of Roughan's examples (144), is an established ground of (relational) authority in such accounts.¹⁴ And it is even more so if one's conception of legal authority is also political and democratic in nature and our vantage point is that of the (shared) subjects to multiple legal orders: the egalitarian dimension of public authority implies sorting relations of law and authority according to the (relation of) equality of its subjects and, arguably, therefore to subsidiarity.¹⁵ To that extent, the relativity condition to legitimacy proposed by Roughan (provided 'conditionality' is the right term in this context and it is not entirely clear to me that it is) and the idea of the 'appropriateness' of the relations between authorities are not absent from revised Razian accounts of legitimacy, and especially public and democratic ones.¹⁶

Take international law and its relations to domestic law once more. In practice, the principle of supremacy or primacy of international law plays an important role in the latter's relations to domestic law's authority over the same subjects. It is not specific, however, as to the exact rank it should have over parts of domestic law that claim enhanced democratic authority. This should not come as a surprise given that democracy and democratic authority are themselves requirements of international law, thus indicating some element of relational authority in the authority claimed by international law itself. The same may be said, albeit with different results, of EU law that aims at 'integrating' domestic law. There, by contrast, the claim to primacy of EU law includes taking priority over domestic constitutional law, but this should come as no surprise since it comes hand in hand with a requirement of democratic legitimacy on the part of the EU itself and a principle of subsidiarity in the implementation of EU law. So, the problem with the authority of international law is not the claim to primacy—on the contrary, that claim is inherent in the idea of legal authority *qua* relational authority—but not understanding how inherently

¹⁴ See Besson (n 4) 357. To that extent, Roughan's distinction between relationships '*between* authorities' and '*of* authority' (12) is not convincing. She actually fails to comply entirely with it herself, as exemplified in her discussion of the relativity condition and of the idea of justifying 'authority' itself on grounds of an '*inter*-authority' relationship (137–42).

¹⁵ In this respect, Roughan (80) misunderstands the argument made in Besson (n 4) 371–2. My point was precisely to show that because the subjects of those multiple sources of authority are the same, their justifications cannot but relate and be sorted by reference to one another from the standpoint of those (shared) subjects—albeit objectively, of course.

¹⁶ See eg Waldron (n 13); Besson (n 4).

relational that claim is and how it may have different implications depending on the contexts of legal authority.

Of course, and Roughan is right about this (185–8), there are areas in international law where primacy is not the principle favoured by international law and where what I have referred to elsewhere as ‘mutual legitimation’ takes place.¹⁷ The norms concerned in those cases are, however, quite special: they are norms of legitimation themselves, such as democracy and human rights in particular. In any case, it is the making of those norms and their legitimation in the making that are mutual. Once applied, they benefit from the primacy claimed by this kind of ‘transnational’ international law over domestic law. One more reason not to put too readily all of international law, and generally law *tout court*, in the same ‘pluralist’ basket.¹⁸

Nothing in the two critiques I have articulated should be read as taking anything away from the many other unique qualities of the book. It is an outstanding contribution to the philosophy of international law and should be at the top of the reading list of anyone interested in the authority of law within and beyond the state.

¹⁷ See Besson (n 7).

¹⁸ See Samantha Besson, ‘Human Rights Pluralism in Europe’ in Kaarlo Tuori and Miguel Maduro (eds), *Transnational Law: Rethinking Legal Thinking* (Cambridge University Press, 2014) 170.